

**LEEBA, 5 OCB2d 29 (BCB 2012)**

(Impasse Appeal) (Docket Nos. BCB-3001-12 & BCB-3002-12) (I-2-09)

**Summary of Decision:** The Union appealed, in part, the Amended Report and Recommendations of an Impasse Panel regarding wages and other terms and conditions of employment for employees in the title of Environmental Police Officer. The Union objected to the Panel's exclusion of a consultant's report from the record and reasserted all its objections to the Initial Report. The City appealed the Panel's Amended Report and Recommendations because it contended that remand was not appropriate and did not cure the Panel's improper consideration of the consultant's report. The City also reasserted all its prior objections to the Initial Report. The Board affirmed the Amended Report and Recommendations in its entirety. (*Official decision follows.*)

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Impasse**

*-between-*

**LAW ENFORCEMENT EMPLOYEES  
BENEVOLENT ASSOCIATION,**

*Petitioner-Respondent,*

*-and-*

**THE CITY OF NEW YORK,**

*Respondent-Petitioner.*

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**DECISION AND ORDER**

On August 3, 2012, the Law Enforcement Employees Benevolent Association ("LEEBA" or "Union") appealed, in part, an Amended Report and Recommendation ("Amended Report") of a one-person Impasse Panel ("Panel"), dated June 30, 2012, regarding a bargaining impasse with the City of New York ("City") over wages and other terms and conditions of employment for employees in the title of Environmental Police

Officer, Levels I, II, and III (“EPOs”). On August 2, 2012, the City appealed the Amended Report in its entirety.<sup>1</sup> The Panel issued the Amended Report pursuant to the Board’s Decision and Order in *LEEBA*, 5 OCB2d 18 (BCB 2012), which addressed the appeals by both parties of the Panel’s initial Report and Recommendations (“Initial Report”), dated January 14, 2012.

In this matter, LEEBA appeals the Amended Report to the Board based on the same arguments it asserted in its appeal of the Initial Report. LEEBA objects to the duration of the contractual period awarded; the application of the “uniformed” pattern of wage increases to the EPO’s present compensation schedule and the failure to award parity with certain other uniformed employees; and the sufficiency of certain other benefits awarded. It also argues that a consultant’s report which the Panel did not admit into evidence (a document that both parties have referred to as the “Smith Report”) should not have been excluded from the record.

The City argues that, in the Amended Report, the Panel failed to cure its improper consideration of the Smith Report following remand by the Board. The City also reasserts its prior arguments including that, among other things, the record evidence does not provide substantial support for the result reached by the Panel; the Initial Report was flawed as a result of material errors of fact and/or law, and was not supported by the NYCCBL’s criteria governing determination by impasse panels; the Panel exceeded its authority by awarding a term that is longer than the contract duration proposed by either party; and the Panel improperly relied on the Smith Report in making its factual findings and reaching its conclusions, resulting in substantial prejudice to the City.

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<sup>1</sup> These two appeals have been consolidated for determination herein.

The Board finds that the Panel complied with its Order to excise all references to the Smith Report and determine whether its conclusions and recommendations remain the same absent consideration of the Smith Report. The Board further finds that the Panel appropriately based its factual findings, conclusions, and recommendations in its Amended Report on an objective and impartial consideration of the record, and that the record provides substantial support for the conclusions it reached. Accordingly, the Board affirms the Amended Report in all respects.

### **BACKGROUND**

This opinion addresses the parties' respective challenges to the Impasse Panel's Amended Report, issued pursuant to this Board's order in *LEEBA*, 5 OCB2d 18 (BCB 2012).

In October 2005, LEEBA was certified to represent City employees in the title of EPO.<sup>2</sup> EPOs are responsible for protecting the watershed areas, water supply systems and installations maintained by the DEP. Furthermore, EPOs enforce the City's Watershed Rules and Regulations. According to the EPO job specification, of which the Board has taken administrative notice, EPOs are classified in the Miscellaneous Service under Rule X of the Personnel Rules and Regulations of the City of New York. Those employees who are classified under Rule X are not included in the Career and Salary Plan. *See* Rules of the City of New York, Title 55, Appendix A, Rule X; *LEEBA*, 3 OCB2d 29, at 2.

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<sup>2</sup> *See LEEBA*, 76 OCB 5 (BOC 2005). The Board of Certification's decision removing the EPOs from their then-existing unit placement and ordering a representation election, which ultimately was won by LEEBA, is found at *LEEBA*, 76 OCB 3 (2005). For a more complete bargaining history, *see LEEBA*, 3 OCB2d 29 (2010).

Following LEEBA's certification, the Union and the City began negotiations for an initial collective bargaining agreement. The parties met to negotiate at least six times between the commencement of bargaining in the fall of 2005 and October 2008. On November 9, 2009, LEEBA filed a Request for the Appointment of an Impasse Panel. The Office of Collective Bargaining ("OCB") brought the parties together for two mediation sessions held in January 2010. The Board, on January 25, 2010, declared that an impasse existed between the parties and directed the commencement of impasse proceedings. *See LEEBA*, 3 OCB2d 29, at 3.

**A. The Impasse Proceeding**

On March 17, 2010, following a selection process pursuant to the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), the OCB designated the Panel to hear the dispute. Hearings commenced following the Board's scope of bargaining determination. *See LEEBA*, 3 OCB2d 29. Impasse hearings were held on October 20 and 28, November 1 and 3, December 6 and 26, 2010, January 31, February 7 and 15, March 17, and May 12, 2011, adducing more than 1,500 pages of record testimony. The parties had a full opportunity to examine and cross-examine witnesses, to submit documents, and to submit written argument in support of their respective positions. In the course of the hearings, the parties introduced 13 Joint Exhibits, 16 City Exhibits, and 73 Union Exhibits.

On January 14, 2012, the Panel issued the Initial Report recommending the terms of the agreement for EPOs. The most significant terms of the Initial Report may be summarized as follows:

- The duration of the agreement shall be from October 20, 2005 (the date LEEBA was certified to represent EPOs) through March 31, 2010;

- Wage increases for all levels and steps of EPOs shall conform to a “uniformed services” pattern, specifically providing for increases of 5% effective 10/20/05; 4% effective 4/1/06; 4% effective 4/1/07; 4% effective 4/1/08; and 4% effective 4/1/09 through 3/31/10;
- Annual contributions to the Union’s Welfare Fund shall be the same as provided to other bargaining units covered by standard unit agreements;
- Additional economic benefits listed below will begin on March 31, 2010:
  - the uniform allowance will be increased to \$1,000 annually;
  - the night shift differential will be raised to 10% beginning at 8:00 p.m.;
  - the Injury on Duty leave benefit will be modified to be up to 18 months leave of absence with pay for any injury occurring while on duty, whether by assault or other causes, and without charge to sick or annual leave; and
  - the Union will be permitted to allocate up to \$75 per employee per year to establish a Legal Defense Fund.

The Initial Report expressly declined to grant the Union’s demands regarding a 40-hour work week and changes in overtime arrangements under the Fair Labor Standards Act.

On January 30, 2012, pursuant to § 12-311(3)(c)(e) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”), LEEBA accepted, in part, and rejected, in part, the recommendations set forth in the Initial Report. On January 31, 2012, pursuant to the same section, the City rejected the Report in its entirety. Both parties, in accordance with NYCCBL § 12-311(4)(a) and § 1-05(m)(2) of the OCB Rules, thereafter filed appeals.

**B. The Motion to include the Smith Report in the Record**

On February 10, 2012, LEEBA filed a motion asking the Board to include the Smith Report in the record for purposes of its appeal of the Panel’s determination in this case. The City submitted papers in opposition to this motion. The Smith Report was prepared, at the request of a former DEP Commissioner, by Professor Dennis C. Smith of the Robert F. Wagner Graduate School of Public Service at New York University. The Union contended that the Smith Report was ordered to evaluate the effectiveness of the

EPO force and determine whether it possessed the necessary resources to adequately protect the environmental interests of the City and surrounding communities from the threat of biological or chemical terrorist attack. (Un. Mot. at 2)

During the impasse hearings, LEEBA requested that DEP produce the Smith Report so that the Union could enter it into evidence. The City objected on several grounds, including that the Smith Report was a draft that never was finalized, it contained sensitive security-related information concerning the City's water supply system, and it was not relevant to the matters in dispute in the impasse proceeding. The Panel reviewed the Smith Report *in camera*, after which it directed that LEEBA representatives be permitted to view a redacted version of it in a room with a City representative present, for the purpose of preparing questions to examine or cross-examine a City witness who would testify. (Tr. 1244-1246) However, as to the admission into evidence of the Smith Report, itself, the Panel ruled that it would not be put directly in the record. (Tr. 1407)

At the time, the Union objected to the Panel's ruling on several grounds, including that the rules of evidence precluded questioning concerning a document not in evidence, and that questioning based on notes might not be as accurate as questioning based upon the original document. (Tr. 1407-1408) In its motion to the Board to include the Smith Report in the record, LEEBA argued that the Panel's exclusion of that document constituted error, that the Smith Report was necessary to an understanding and evaluation of the Panel's Report, and that it would be "a marvelous starting point for the Board to learn about the duties, responsibilities, and job functions" of the EPOs. (LEEBA Mot. at 8-9)

The City opposed the motion, arguing that there was no basis to overturn the Panel's evidentiary ruling excluding the Smith Report. The City asserted that the Panel's ruling was a legitimate exercise of the discretion given impasse panels. Moreover, according to the City, it would be prejudicial to its interests if the motion were granted, because the City, in reasonable reliance on the Panel's ruling, did not present any evidence or argument regarding the Smith Report, such as evidence of why DEP never requested a final version of the draft Report, or what it believed were the errors in the Report.

On April 20, 2012, the Trial Examiner in this matter issued a six-page letter-ruling denying the Union's motion on three grounds. First, the Trial Examiner found that it would be contrary to NYCCBL § 12-311(c)(4)(b) ("review . . . shall be based upon the record and evidence made and produced before the impasse panel") to make part of the record on appeal, and thus subject to review by the Board, a document the admittance of which was argued before the Panel and which the Panel ruled would be excluded from the record. Second, the Trial Examiner found that granting the motion would be prejudicial to the City because it would deprive the City of the opportunity to offer evidence as to reasons for DEP never requesting a final version of the Report, or what DEP believed were the errors in the Report. Third, to the extent the transcript of the impasse proceedings shows that the Panel's evidentiary ruling was based, at least in part, on its concern that full disclosure of the Smith Report would pose a risk to the security of the watershed, the Trial Examiner found it would be imprudent to overrule the Panel and place the Smith Report in the record on appeal – thus making it a public document –

without any showing by the Union that the security concerns of the City – and the Panel – were unwarranted.

LEEBA took exception to the denial of its motion to the Board, asserting that the Trial Examiner was without authority to rule on a motion not made in the course of a hearing and that a ruling on the motion made by anyone other than the Board deprives the Union of “due process.” LEEBA did not address the merits of the Trial Examiner’s ruling. The parties were informed that the Board would review the ruling on the motion as part of its consideration of the impasse appeals.

C. **The Appeal of the Initial Report and the Panel’s Amended Report**

Both parties raised numerous objections to the Panel’s Initial Report. After consideration of the parties’ objections, the Board issued a Decision and Order on May 29, 2012. *LEEBA*, 5 OCB2d 18. The Board determined that: (1) the Panel properly relied upon factual findings by the Board of Certification in *LEEBA*, 76 OCB 3; (2) in awarding a uniformed services pattern of settlement, it was not unreasonable for the Panel to consider record evidence concerning certain changes, including changes in duties and training, that had occurred affecting EPOs; (3) the Panel’s award did not disregard the City’s ability to pay; (4) the length of the agreement between the parties is a matter properly within the Panel’s discretion and is not limited to any term proposed by one or both parties; and (5) the Panel reasonably excluded the Smith Report from evidence based on the reasons it articulated in the Initial Report.<sup>3</sup> *Id.* at 18-26.

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<sup>3</sup> The Board also adopted the Trial Examiner’s decision denying LEEBA’s motion to include the Smith Report in the record on appeal before the Board. *LEEBA*, 5 OCB2d 18 at 27.



However, the Board found that the Panel had made reference to the substance of the Smith Report, despite having excluded the document from evidence. The Board expressed the concern that such reference made it unclear whether the Panel relied on the Smith Report as a basis for making its determination or whether it merely cited to it as “describing findings similar to those which the Panel reached based on its own independent analysis of the record testimony and exhibits.” *LEEBA*, 5 OCB2d 18, at 29. Accordingly, the Board remanded the matter to the Panel to: (1) excise all references to the Smith Report from the Initial Report; (2) determine whether it would have reached the same conclusions and made the same recommendations without any consideration of the referenced portions of the Smith Report; and (3) to the extent the Panel deemed it necessary or appropriate, clarify and/or amend its Report accordingly. *Id.* at 30-31. The Board upheld the Initial Report in all other respects. *Id.*

On June 30, 2012, in accordance with the Board’s Decision and Order, the Panel issued its Amended Report, in which all references to the Smith Report were expunged. In addition, the Panel responded to the Board’s request for clarification and/or reconsideration, stating:

This Panel’s recommendations are based solely and exclusively on the testimony and documentary evidence in the record of this proceeding, which are extensively cited and referenced herein. The content of the Smith Report was not relied upon by this Panel for findings of fact, nor was that report considered substantive evidence as a basis for any of this Panel’s recommendations. The reference to the Smith Report was made solely to note that a consultant employed by the Department of Environmental Protection arrived at similar (but not identical) conclusions concerning personnel matters as arrived at by this Panel.

(Am. Rept. p.1 fn.1) In sum, the Panel stated that after reconsidering the evidence and without regard to the Smith Report, it arrived at the same findings of fact, conclusions, and recommendations as were contained in the Initial Report. (*Id.*)

By letter dated July 19, 2012, the City rejected the Amended Report in its entirety. Thereafter, on August 2, 2012, the City filed a Second Verified Petition seeking the Board's review of the Amended Report. On July 21, 2012, the Union rejected, in part, the Amended Report, on the same grounds as it had previously rejected the earlier Report. By letter dated August 3, 2012, the Union requested that the Board deem its prior petition and brief, filed February 13, 2012 and March 29, 2012, respectively, resubmitted as its grounds for appeal of the Amended Report.

### **POSITIONS OF THE PARTIES**

#### **LEEBA's Position**

In response to the City's Second Amended Petition, LEEBA denies that the Amended Report should be vacated, but rather contends that it should be modified to include the Smith Report in the record. (Un. Ans. to 2<sup>nd</sup> Pet., ¶¶ 8, 11) LEEBA also contends that the Amended Report "appears to be identical" to the Initial Report. (*Id.*, ¶ 6) Accordingly, the Union resubmitted its initial appeal petition and brief and requested that the Board deem the same arguments set forth therein to be the grounds for LEEBA's appeal of the Panel's Amended Report. The Union argues that the provisions of the Amended Report, like the Initial Report, are either insufficient or in error.<sup>4</sup>

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<sup>4</sup> We do not repeat the arguments the Union made in its appeal of the Initial Report but refer the reader to the Union's Position in the Board's Decision in *LEEBA*, 5 OCB2d 18.

**City's Position**

The City argues that the Panel, in its Amended Report, failed to cure its improper consideration of the Smith Report after being directed to do so by the Board upon remand. The City contends that, although the Panel removed all references to the Smith Report from the Amended Report, it persisted in relying on it in making its determinations, as it had done in the Initial Report, resulting in prejudice to the City. The City states that, in the Initial Report, the Panel explicitly cited the Smith Report for its finding that certain “trends” pertaining to the scope of the EPOs’ mission had continued subsequent to the Board of Certification’s 2005 Decision (“2005 Certification Decision”), which made factual findings on the subject. Those findings remain in the Amended Report yet, according to the City, they now lack any evidentiary basis as a result of the removal of the references to the Smith Report. The City asserts that, notwithstanding the Panel’s statement that it would have made the same factual findings in the absence of the Smith Report, this demonstrates that the Panel continued to rely on the Smith Report for its findings.

The City also contends that Board’s remand of the Initial Report to the Panel for its reconsideration without regard to the Smith Report is “fundamentally meaningless” because the Board otherwise affirmed the Panel’s findings and recommendations. (2<sup>nd</sup> Pet. ¶ 11) According to the City, by affirming the remaining portion of the Initial Report, the Board demonstrated that it had already determined that the rest of the Initial Report provided a “sufficient basis” for denying both parties’ appeals. (*Id.* ¶ 12) As a result of this determination that the initial outcome was acceptable, the Panel could no longer serve to impartially evaluate its prior decisions and accordingly the Panel failed to cure

its improper consideration of the Smith Report. (*Id.*) The City also reasserts the same arguments it made in its initial appeal petition and brief in support of the modification and/or rejection of the Initial Report and contends that the Amended Report should be set aside for those reasons as well.<sup>5</sup>

The City requests that the Board issue an order either: (i) modifying the Amended Report to conform to the City's proposal for an award consistent with the civilian pattern bargaining for 2005-06 and 2006-08; or (ii) setting aside the Amended Report and "remanding the matter to a new Impasse Panel to conduct such further proceedings as it may deem appropriate, and/or to issue a new Amended Report . . . based on the record evidence." (2<sup>nd</sup> Pet. ¶ 13)

### **DISCUSSION**

Pursuant to NYCCBL § 12-311(c)(4)(b), where the report and recommendation of an impasse panel is appealed to this Board, our review shall be based upon the record and evidence before the impasse panel; shall include an examination of whether the panel's recommendations take into account the standards for determination of wages, hours and working conditions prescribed by NYCCBL § 12-311(c)(3)(b); and shall include consideration of issues, if any, of conformity of the recommendation with any law or regulation properly governing the conduct of collective bargaining between the City and its employees. *DC 37*, 4 OCB2d 29, at 8 (BCB 2011); *UFA*, 51 OCB 19, at 10 (BCB 1993).

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<sup>5</sup> We do not repeat the arguments the City made in its appeal of the Initial Report but refer the reader to the City's Position in the Board's Decision in *LEEBA*, 5 OCB2d 18.

The Board's function in this proceeding is limited to deciding "whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel." *DC 37*, 4 OCB2d 29, at 9. In reviewing a report and recommendation, the Board shall not substitute its own judgment in determining the facts or adjudicating the merits for that of the impasse panel. *Id.* at 9-10; *see also UFA*, 37 OCB 11, at 6 (BCB 1986); *UFA*, 51 OCB 19, at 11; *Podiatry Soc. of NYS*, 9 OCB 23, at 8 (BCB 1972); *Caso v. Coffey*, 41 N.Y.2d 153, 158 (1976) ("[I]t need only appear from the decision of the arbitrators that the criteria specified in the statute were 'considered' in good faith and that the resulting award has a 'plausible basis.'") (citation omitted). Thus, an impasse report and recommendation shall be upheld "unless it can be shown that the Report and Recommendations were not based on objective and impartial consideration of the entire record, and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law." *DC 37*, 4 OCB2d 29, at 10; *UFA*, 51 OCB at 11-12 (quoting *Podiatry Soc. of NYS*, 9 OCB 23, at 8); *see also Caso*, 41 N.Y.2d at 158 (Because the "essential function of compulsory arbitration panels is to 'write collective bargaining agreements for the parties,' [i]t follows that such awards, on judicial review, are to be measured according to whether they are rational or arbitrary and capricious.") (citing *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 503 (1970)); *Matter of Buffalo Professional Firefighters' Assn. v. Masiello*, 13 N.Y.3d 803, 804 (2009) (same).

We first address the City's objections to the Amended Report. The City contends that the Amended Report should be set aside because the Panel failed to cure its improper consideration of the Smith Report upon remand. (2<sup>nd</sup> Pet., ¶ 8) The City argues that, while the Panel theoretically complied with the Board's Order by removing all references to the Smith Report from its findings, a review of the Amended Report reflects that the Panel's findings and conclusions still rely on the Smith Report for evidentiary support. (*Id.* at 10) The City points to a solitary example of this reliance on the Smith Report in the Amended Report. It contends that, in the Initial Report, the Panel explicitly cited the 2008 Smith Report for its finding that certain "trends" pertaining to the expanding scope of the EPOs' mission had continued subsequent to the 2005 Certification Decision, which made factual findings on these "trends." (*Id.*) The Panel's finding that the "trends" continued after 2005 remains in the Amended Report yet, according to the City, it now lacks any evidentiary basis following the removal of references to the Smith Report. (*Id.*)

As we stated above, one of the Board's functions in this proceeding is to determine "whether the record provides substantial support for the result reached by the impasse panel." *DC 37*, 4 OCB2d 29, at 9. Indeed, New York courts have stated that, "[t]o be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious." *RDK Medical P.C. v. General Assurance Co.*, 8 Misc.3d 1025(A), 806 N.Y.S.2d 448, 2005 N.Y. Slip Op. 51281(U), 2005 WL 1936342 (Kings Co. Civ. Ct. Aug. 12, 2005) (quoting *Motor Vehicle Accident Indemnification Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 214 (1996)). An arbitrator's award will be vacated when, "aside from the inadmissible evidence, no other

evidence or basis in reason appears in the record to support the arbitrator's finding." *Id.* (citation omitted).

Contrary to the City's contention that there is "simply no other evidentiary basis for the Impasse Panel's finding," that certain "trends" in the job duties and functions of EPOs continued after 2005, the Amended Report reflects that the Panel explicitly considered testimony and evidence other than the Smith Report to reach that finding. (2<sup>nd</sup> Pet. ¶ 10) For example, the Panel cited a report offered by the City titled, "Selected Crime Statistics for DEP Police 2006-09," to conclude that "from 2006-2009 [EPOs] continued to be sometimes involved in law enforcement activities not directly related to the protection of the watershed, primarily property crimes and assault." (Am. Rept., p. 17) (citing City Ex. 12) The Panel also relied upon witness testimony to conclude that "the EPOs' involvement in law enforcement unrelated to the watershed has nonetheless continued" subsequent to a 2007 order from the EPO Chief "to keep EPOs primarily focused on protection of the water supply system." (Am. Rept., p. 18) (citing City Ex. 12; Tr. 1449-55)

The Amended Report explicitly stated that:

This Panel's recommendations are based solely and exclusively on the testimony and documentary evidence in the record of this proceeding, which are extensively cited and referenced herein. The content of the Smith Report was not relied upon by this Panel for findings of fact, nor was that report considered substantive evidence as a basis for any of this Panel's recommendations.

(Am. Rept., p. 1 fn. 1) The Panel further explained that its prior reference to the Smith Report was in essence corroborative, noting that "a consultant employed by the Department of Environmental Protection arrived at similar (but not identical) conclusions

concerning personnel matters as arrived at by this Panel.” (*Id.*) No party has adduced grounds tending to show, and we find no evidence upon which to conclude, that this statement is not accurate. The Amended Report clearly reflects that the Panel relied substantively on evidence in the record to support its conclusion that the “trends” in the job duties and functions of EPOs continued after 2005. (*See, e.g.*, Am. Rept. at 16-17 (comparing issuance by EPOs of “some 4,494 summonses between May 2000 and November 2003” (based on Union Ex. 7) to “800 arrests and some 6,157 summonses from 2006-2009” (based on City Ex. 12), all of which related to general police functions.<sup>6</sup> Accordingly, the City’s implication that the Panel ignored the Board’s specific instructions and gave the Smith Report some weight, is simply unsupported. The record demonstrates that the Panel did not rely on the Smith Report for its finding concerning the “trends” in the job duties and functions of EPOs after 2005. Therefore, we find that the “the record provides substantial support for the result reached” by the Panel, as reflected in the Amended Report. *See DC 37, 4 OCB2d 29, at 9.*

The City next argues that the Board’s remand of the Initial Report to the Panel was in error. It contends that the Panel’s reliance on the Smith Report compelled the Board to vacate the Initial Report because, in effect, the entire decision is tainted as a result of the unquantifiable influence of the Smith Report on the Panel’s findings. We find no support for this claim. The New York courts have consistently held that “[t]he admission of evidence that might well be precluded in a court of law is not sufficient cause for vitiating an award unless the mistake or error of law is so gross or palpable as to

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<sup>6</sup> *See also* Am. Rept. at 18, providing other examples, with citations to the hearing transcript and exhibits, referencing “trends” in the job functions and duties of EPOs which continued after 2005.



amount to fraud, misconduct or breach of authority.” *RDK Medical, P.C.*, , 2005 WL 1936342, at \*3; see *Matter of N.Y.S. Inspec., Security & Law Enforcement Employees v. N.Y.S. Dept of Corr. Svcs.*, 227 A.D.3d 856, 857 (3d Dept. 1997). As noted in the Amended Report, the Panel did not solely rely upon the Smith Report to reach its conclusion regarding post-2005 trends in the EPOs’ job duties. Instead its conclusions were explicitly supported by other facts in evidence. Further, the City has failed to provide any support for its assertion that the only proper remedy in this instance was vacatur. It has not made any allegations of fraud, misconduct or abuse of authority by the Panel in this matter. At most, the City has asserted that the Panel failed to consistently apply its own evidentiary ruling, a contention which does not establish misconduct warranting vacatur. See, e.g., *Matter of Breziski v. Rockville Ctr. Union Free Sch. Dist.*, 2012 N.Y. Slip Op. 31184 (U) (Sup. Ct. Nassau Co. Apr. 18, 2012) at 12-13.

Moreover, the City’s reliance on *In re Application of Fischer*, 106 A.D.2d 314, 315 (1<sup>st</sup> Dept. 1984) (Kassal, J., concurring), and *Saffir v. Wilson*, 100 N.Y.S.2d 263 (Sup. Ct. N.Y. Cty. 1950), for the proposition that an arbitrator’s receiving evidence which would be inadmissible in judicial proceedings compels vacatur, is misplaced. Neither case stands for such a proposition. Rather, both of these matters involved factual claims of *ex parte* investigation or actions by the arbitrator that are not alleged here.<sup>7</sup> On

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<sup>7</sup> We note that in *LEEBA*, 5 OCB2d 18, we cited *Fischer*, along with other authority, for the proposition that “the courts may vacate an arbitration award where the arbitrator considered matters not in evidence.” *Id.*, at 29. However, this citation to *Fischer* neglected to indicate that this reference is contained in the concurring opinion by Judge Kassal, and not the majority opinion. Judge Kassel noted that the arbitrator had received *ex parte* communications on the facts before him that raised “questions as to the impartiality of the proceedings and the conduct of the arbitrator,” which could require vacatur. 106 A.D.2d at 317-318. Here, there is no allegation that the Panel received *ex parte* communications.

the contrary, the record shows that the Smith Report was made available to all parties during the course of the impasse hearings so that the parties were able to question witnesses on it and fully develop a record.

Nor do we find any error in regard to our remand to the Impasse Panel for clarification and/or amendment of its conclusions and recommendations. Indeed, courts have confirmed that remand is the appropriate remedy in circumstances similar to the instant matter. In *Hollenbeck v. Owego Police Benevolent Assn.*, 25 PERB ¶ 7540 (1992), the petitioner sought to vacate an arbitration award on several grounds, including that the arbitration panel did not set forth the criteria considered or the basis for its findings on certain issues. The court determined that remand, and not vacatur, was the appropriate remedy for the deficiency so that the court could ascertain whether the panel's findings had a rational basis in the criteria and factors considered by the panel. *Id.*

Similarly, the Board remanded the Initial Report to clarify the extent, if any, to which the Panel relied on the Smith Report as a basis for making its findings in one limited circumstance. *LEEBA*, 5 OCB2d 18, at 29-31. That reference was in the context of the evolution of the EPOs' job duties, responsibilities, training and jurisdiction. *Id.*, at 28. The Board has remanded other impasse panel cases for similar reasons. *See, e.g.*, *DC 37*, 4 OCB2d 29, at 15; *UFA*, 51 OCB 19, at 14 (BCB 1993).

The City further contends that the Board, in otherwise affirming the Panel's findings and conclusions, effectively "signaled what it deemed necessary" to obtain an "acceptable outcome" on remand, thus curtailing any requirement that the Panel undertake a "*bona fide* examination of its own reasoning." (2<sup>nd</sup> Pet., ¶ 12) However, the

Board's Decision and Order explicitly required the Panel to conduct a *bona fide* examination of its reasoning. We specifically directed the Panel to excise all references to the Smith Report, and determine whether it would have reached the same conclusions and recommendations without any consideration of the referenced portions of the Smith Report. *LEEBA*, 5 OCB2d 18, at 30-31. We further gave the Panel the opportunity to clarify and/or amend its Report where it deemed it necessary or appropriate. *Id.* The City's assertion simply ignores the entire detailed analysis set forth by the Panel in its Initial and Amended Reports. It also ignores the fact that the Panel's references to the Smith Report were limited to three instances in the Initial Report, only one of which was substantive..

The remand of the Initial Report to the Panel to clarify a limited point does not amount to a tacit indication that the Panel was not required to reevaluate its conclusions absent consideration of the Smith Report nor does it vitiate the Panel's ability to impartially reevaluate its conclusions. There has been no showing that the Panel was no longer impartial following the issuance of its Initial Report.

Finally, we address LEEBA's argument that the references to the Smith Report should not have been excised from the Initial Report, that the Smith Report should be admitted into the record, and that the Amended Report should be "modified to conform to the evidence in the record." (Ans. to City's 2<sup>nd</sup> Pet., ¶ 8) In *LEEBA*, 5 OCB2d 18, we found that the Trial Examiner properly denied the Union's motion to include the Smith Report in the record on appeal before this Board. *Id.* at 26-27. New York courts have held that an arbitrator does not commit a prejudicial error by excluding evidence except if the evidence was "pertinent and material." *Matter of Beals v. New York City Transit*, 94

A.D.3d 543, 544 (1<sup>st</sup> Dept. 2012) (citing *Matter of Professional Staff Congress/City Univ. of N.Y. v. Bd. of Higher Educ. of City of N.Y.*, 39 N.Y.2d 319, 323 (1976)). LEEBA has argued that the primary basis for requiring admission of the Smith Report is that it would be “a marvelous starting point for the Board to learn about the duties, responsibilities, and job functions of the Environmental Police from an unbiased analysis.” (Union Mot. at 8-9) However, LEEBA was permitted to introduce other evidence concerning the EPOs’ duties, responsibilities and job functions and the Panel credited such testimony, finding in LEEBA’s favor as to these issues. Where the excluded evidence would have been “cumulative of the testimony based on personal knowledge that had been heard from witnesses,” no grounds for vacatur have been established. *Beals*, 94 A.D.3d at 544. We further find that LEEBA has not disproven or rebutted the grounds upon which the Panel predicated its ruling to exclude the Smith Report. As such, we adhere to and confirm our finding that the Panel acted within its discretion in excluding the Smith Report from the record, and that LEEBA has not demonstrated any prejudice from this ruling. *See LEEBA*, 5 OCB2d 18, at 26-27.

Finally, as we previously noted, the majority of arguments advanced by the parties are reassertions of their previous arguments seeking the Board’s modification and/or rejection of the Initial Report. In *LEEBA*, 5 OCB2d 18, we carefully considered each of these arguments using the appropriate standards of review under the NYCCBL. *Id.*, at pp. 16-30. With the exception of the Board’s finding that the Panel’s references to the Smith Report were improper and its subsequent remand, the Board determined that the Panel’s factual findings, conclusions, and recommendations were reasonable, and affirmed the Initial Report. Neither the City nor the Union has presented any substantive

reason or justification to support a reevaluation by the Board of the same arguments each party made in connection with the appeal of the Initial Report. We find no independent reason to revisit our analysis of the Panel's findings. Therefore, we affirm the Panel's Amended Report in its entirety.

**ORDER**

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the appeal of the Law Enforcement Employees Benevolent Association be, and the same hereby is, denied; and it is further

ORDERED, that the appeal of the City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the Amended Report and Recommendation of the Impasse Panel, a copy of which is annexed hereto and made a part hereof, be, and the same hereby is, affirmed.

Dated: September 4, 2012  
New York, New York

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

I dissent.

PAMELA S. SILVERBLATT  
MEMBER

I dissent.

ERNEST F. HART  
MEMBER

CHARLES G. MOERDLER  
MEMBER

GWYNNE A. WILCOX  
MEMBER